IN THE MATTER OF THE HUMAN RIGHTS CODE, R.S.O. 1990, c. H.19

And in the matter of the Complaints of Kathleen Lewis, by her next friends, Robert and JoAnn Lewis, dated April 22, 1985 and March 13, 1986, pursuant to section 32 of the Human Rights Code, alleging discrimination in services on the basis of handicap and constructive discrimination by the York Region Board of Education, Her Majesty the Queen in Right of Ontario, the Ministry of Education, R.A. Cressman, J. Laughlin and J.W. Rogers

AND IN THE MATTER OF AN APPLICATION by the Ontario Human Rights Commission for an order for disclosure by certain of the Respondents

Board of Inquiry: - M.R. Gorsky

Appearances:

For the Ontario Human Rights Commission - Ms. C. Pike
Counsel

For the Complainant - Mr. D. Baker
Counsel

For the Respondents, York Region Board of Education, R.A. Cressman and J. Laughlin
- Ms. B. Bowlby
- and Ms. M. Mackinnon
Counsel

For the Respondent Her Majesty the Queen in Right of Ontario, the Ministry of Education
- Mr. John Bell
- and Ms. D. Goldberg
Counsel

INTERIM DECISION

This decision relates to a request made by counsel for the Ontario Human Rights Commission (the "Commission") for an order that certain of the Respondents provide it with the documents referred to in a letter dated April 20,1994. Written submissions were requested and received from the parties.

THE MOTION

1. By letter dated April 20, 1994, counsel for the Commission asked counsel for York Region Board of Education ("York Region") to provide the following:

> 1. Documents upon which you intend to rely at the hearing. (I do not require a complete set of such documents now, as I realize that the relevance of documents may change at [sic] the hearing progresses. I would, however, appreciate receiving those documents upon which you now know you intend to rely.)
>
> 2. Documents within your client's possession and control relating to Katie Lewis, to the allegations or issues raised in the complaint, or to the defences raised by York Region Board of Education.

2. By letter dated April 21, 1994, the Commission made the equivalent request of the Ministry of Education.

3. By letter dated April 21, 1994, counsel for York Region denied the Commission's request.

4. Counsel for the Ministry had already indicated that he would be prepared to make production, the details of which have not been specified. To date the documents sought have not been received.

5. By letter dated February 2, 1994, counsel for York Region Board of Education, R.A. Cressman and J. Laughlin (collectively referred to herein as "YRBE") wrote to counsel for the Commission requesting disclosure of the following documents:

i. all statements made by the Complainant to the Commission and its employees or other agents at the investigation stage of the Complaint;

ii. all statements of all witnesses interviewed by employees of the Commission or its agents during the investigation stage, and their identities;

iii. all statements of all witnesses interviewed by employees of the Commission or its agents who the Commission does not intend to call to give oral evidence in the proceedings but whose statements might reasonably aid the respondents in answering the Commission's case;

iv. all investigating notes of employees of the Commission or its agents;

v. all documents obtained by employees of the Commission or its agents in connection with the Complaint.

Commission's Materials, Tab 25

6. The documents referred to in paragraph 5 above were, in fact, disclosed to YRBE by the Commission in due course.

7. By letter dated March 25, 1994, counsel for YRBE requested that counsel for the Complainant produce the following documents:

1. Any reports, letters or other documents from "expert" witnesses you will be calling (ie. Sue Master, Dr. Donald Kennedy, Carol Ann Young, Dorothy Griffith, Marie Thompson-Mintz).

2. Medical and psycho-education reports respecting Katie.

3. Any further reports, documents, or letters bearing on the issues raised by the Human Rights Complaint.

Commission's Materials, Tab 27

8. The Complainant did, in fact, provide YRBE with the documents requested by YRBE's counsel.

9. On or about April 21, 1994, counsel for YRBE replied to the Commission's request for disclosure in the following terms:

> I have in hand your letter of April 20th.
>
> My client is under no obligation to provide any disclosure to the Human Rights Commission. I remind you (again) that the Human Rights Commission had a full opportunity for disclosure when it conducted its investigation. It was the Commission which decided that it had sufficient evidence to prosecute the complaint against my client. My client is not, now, obliged to provide further evidence to you.
>
> I have indicated that I will provide you in advance of the hearing on [sic] any documents which I will put into evidence. I am not prepared to do so until the Commission has completed its case. My client is entitled to be satisfied that there is, in fact, a case to meet. That assessment can only be made after your case is completed.

Commission's Materials, Tab 29

10. On or about May 31, 1994, the Complainant provided brief written submissions supporting the Commission's position taken in

its submissions dated May 26, 1994, seeking similar disclosure for the Complainant.

Submissions Made on Behalf of the Commission With Respect to the Production of Documents

1. Reference was made to section 8 of the Statutory Powers Procedure Act (the "SPPA") with respect to the furnishing of particulars:

> Where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto.

2. In board of inquiry proceedings under the Code, s. 8 of the SPPA has been interpreted to require that the issues be sufficiently defined so as to enable the respondent to prepare itself to answer the allegations. Boards of inquiry have held that s. 8 does not refer to advance notice of documentary evidence, nor does it contemplate a means of obtaining discovery. Dubajic v. Walbar Machine Products of Canada Limited (1980), 1 C.H.R.R. D/228 (Ont. Bd. of Inq.); Salamon v. Search Paralegal Services (1987), 8 C.H.R.R. D/4162 (Ont. Bd. of Inq.); Findlay and McKay v. Mike's Smoke and Gifts (unreported, April 29, 1993, Ont. Bd. of Inq.)

3. Dealing with the subject of production, reference was made to s.12(1)(b) of the SPPA:

> 12(1) A tribunal may require any person, including a party, by summons ...
>
> (b) to produce in evidence at a hearing documents and things specified by the tribunal,
>
> relevant to the subject-matter of the proceedings and admissible at a hearing.

4. Reference was also made to s.10(c) of the SPPA:

> A party to a proceeding may at a hearing ...
>
> (c) conduct cross-examinations of witnesses at a hearing reasonably required for a full and fair disclosure of the facts in relation to which they have given evidence.

5. Boards of inquiry have held that the purpose of s.12(1)(b) of the SPPA is to allow a document to be produced in evidence at the hearing and not to allow for the production of documents in advance of the hearing. Boards of inquiry have refused to issue or have quashed a subpoena duces tecum where it has been concluded that the subpoena power under s.12 was being used to obtain discovery. Guru v. McMaster University (1981), 2 C.H.R.R. D/1253 (Ont. Bd. of Inq.); Walbar Machine Products v. OHRC (1980), 1 C.H.R.R. D/1228 (Ont. Bd. of Inq.); Joseph v. North York General Hospital, et al. (1982), 3 C.H.R.R. D/854 (Ont. Bd. of Inq.); Bezeau v. Ontario Institute for Studies in Education (1982), 3 C.H.R.R. D/874 (Ont. Bd. of Inq.); Salamon v. Searchers Paralegal Services (1987), 8 C.H.R.R. D/4162 (Ont. Bd. of Inq.); Adair v. K.B. Homes Insulation Ltd. (1991), 15 C.H.R.R. D/331 (Ont. Bd. of Inq.)

6. Boards of inquiry have noted the difficulties created by the unavailability of a discovery procedure under the Code, such as the interruption of proceedings arising from the production of documents in the course of a hearing, or the potential for a "cat and mouse game" and have, at times, expressed regret that some form of discovery procedure does not exist under the Code. Helen Niedzwiecki v. Beneficial Finance System, (Ont. Bd. of Inq., May 29, 1981) cited in Joseph v. North York General Hospital, supra, p. D/857; Gohm v. Domtar Inc. (1990), 11 C.H.R.R. D/1420; see also "Discovery Due Process Under the Human Rights Code" (1983), U.W.O.L.Rev. 55.

7. Adjournments have been permitted so that counsel may review documents made available pursuant to ss. 12(1) and 10. Dubajic v. Walbar Machine Products of Canada Limited, supra; Edilma Olarte et al. v. Rafael De Filippis and Commodore Business Machines Ltd. (1983), 4 C.H.R.R. D/1705 (Ont. Bd. of Inq.); affirmed (1984), 49 O.R. (2d) 17 (Ont. Div. Ct.); OHRC v. The Ministry of Education (1988), 9 C.H.R.R. D/4535 (Ont. Bd. of Inq.); Guru v. McMaster University, supra.

8. The above representations were made in the light of the jurisprudence that existed prior to Christian, Dillion, Edwards et al. v. Northwestern Hospital et al. Interim Decision (Disclosure) July 27, 1993, Ont. Bd. of Inq., unreported (House) (application for judicial review dismissed by the Divisional Court, decision

released November 18, 1993) OHRC v. Jeffry House, Northwestern Hospital et al.; application for leave to appeal to the Court of Appeal dismissed January 31, 1994. [Note: The Divisional Court's decision has since been reported at (1993) 67 O.A.C. 72, however, for ease of reference, the unreported version supplied by the Commission will be referred to herein.)

9. In the Northwestern Hospital case, the respondent sought to compel production of human rights officers' notes and witness statements by issuing subpoenas duces tecum to a number of Commission officers returnable on a date prior to the hearing. Commission counsel moved to quash the subpoenas on the grounds that they were premature and an attempt to obtain pre-hearing discovery. Commission counsel also took the position that the material sought to be produced was privileged and that even if the subpoenas were not premature, that is, were returnable during the hearing, the board should not order the documents produced. To obviate the need for further adjournments, Commission counsel agreed to provide any materials ordered produced prior to the next scheduled date for the hearing.

10. The board of inquiry ordered the Commission to provide to the respondents all statements made by the complainants to the Commission and its investigators at the investigation stage, whether reduced to writing or copied by mechanical means. The board of inquiry further ordered the Commission to provide the

respondents with the statement and identity of witnesses interviewed by the Commission or its agents, who the Commission did not propose to call and whose statements might reasonably aid the respondents in answering the Commission's case.

11. In the wake of the decisions in Northwestern, the Commission made broad disclosure available to the Respondents. The Commission complied with Ms. Bowlby's request, in her letter of February 2, 1994, for disclosure of:

> i. all statements made by the Complainant to the Commission and its employees or other agents at the investigation stage of the Complaint;
>
> ii. all statements of all witnesses interviewed by employees of the Commission or its agents during the investigation stage of the Complaint;
>
> iii. all statements of all witnesses interviewed by employees of the Commission or its agents who the Commission does not intend to call to give oral evidence in the proceedings but whose statements might reasonably aid the respondents in answering the Commission's case;
>
> iv. all investigating notes of employees of the Commission or its agents;
>
> v. all documents obtained by employees of the Commission or its agents in connection with the Complaint;
>
> vi. all statements by the Complainant in respect of all responses and submissions made by the respondents to the Commission.

12. Counsel for the Commission made a number of submissions under the heading "Mutuality of Disclosure Obligations."

13. It was submitted that the result of the Northwestern board and Divisional Court decisions created a striking asymmetry in the materials available to the respective parties as the hearing commences. Counsel for Respondents were said to now have, prior to the commencement of the hearing, in addition to the complaint and case summary, all documents obtained in the course of the Commission's investigation (except documents relating to conciliation, and internal Commission memoranda). As Ms. Bowlby stated in her letter to David Baker of March 25, 1994, the Commission provided "complete disclosure of documents." It was noted that in this case, counsel for the Complainant has made available to the Respondents all documents in the possession or control of JoAnn and Robert Lewis touching upon the subject matter of the complaints.

14. That Commission officers have certain powers of investigation was said not to be an answer to the present "inequality" in the obligations of the parties to make disclosure. Section 32(3) of the Code under which these complaints arose, provides that:

> A person authorized to investigate a complaint may,
>
> (a) enter any place, other than a place that is being used as a dwelling, at any reasonable time, for the purpose of investigating the complaint;
>
> (b) request the production for inspection and examination of documents or things that are or may be relevant to the investigation;
>
> (c) upon giving a receipt therefor, remove from the place documents produced in response to a request under clause (b) for the purpose of making copies thereof or extracts therefrom and shall

> promptly return them to the person who produced or furnished them; and
>
> (d) question a person on matters that are or may be relevant to the complaint subject to the person's right to have counsel or a personal representative present during such questioning, and may exclude from the questioning any person who may be adverse in interest to the complainant.

15. The question of whether an officer's powers to investigate are grounds for denying a request for production (pursuant to s. 12(1) of the SPPA) has been discussed by several boards of inquiry. In Joseph v. North York Hospital et. al. (supra) the board held that the Commission's investigative powers constituted adequate provision for compelling disclosure from respondents. The reasoning of the Joseph board of inquiry was not followed in Bezeau v. Ontario Institute for Studies in Education (1982), 3 C.H.R.R. D/874 (Ont. Bd. of Inquiry) which decision is referred to by Judith Keene as being "more realistic" on this issue. With reference to the Bezeau decision, Ms. Keene comments that:

> [t]he Board noted that, although failure to comply with the Commission's request for disclosure during the investigation might result in prosecution, the minister's consent was required for such a prosecution. Counsel for the Commission argued that prosecution, as a method of obtaining documents, was too "heavy handed" in human rights cases. The only alternative was to obtain a search warrant which, as it requires a specific description of the object to be seized, is limited as a discovery device, and which the board also regarded as "heavy handed". The board further noted that a heavy-handed approach might jeopardize settlement, which is the primary objective of the investigative stage of complaint. The board concluded that, from a practical standpoint, the investigative provisions of the Code are "restricted in scope to what is necessary to effect a settlement."

> Keene, Judith, Human Rights in Ontario, Carswell 1992, pp. 300, 301; Joseph v. North York Hospital et. al., supra D/856

16. Ms. Keene also noted that the Code under which Joseph was determined was the predecessor to the 1981 Code, and differed from it in the following respect: whereas the predecessor Code empowered an officer to "require" the production of documents, the relevant provision of the 1981 Code (which has not been changed to date) only allows an officer to "request" documents.

> The only options available to the Commission where the respondent refuses to produce documents are to apply for a search warrant, or to request the Minister to appoint a board of inquiry. In cases in which the most cogent evidence, or the largest part of the evidence, is likely to be found in documentary form, the Commission may have difficulty in either obtaining a search warrant or in appointing a board.

Human Rights in Ontario, supra, p.301

17. In Youmans v. Lily Cups, the board of inquiry asked the respondent to make voluntary production in response to a preliminary motion by the Commission, notwithstanding the Commission's investigative powers. The Board noted that the Commission had undertaken no steps to obtain the documents denied by the respondents during the investigation stage, but held that since the case had already suffered long delay, it would be in the interest of all the parties to indicate the ruling that the Board would make, should a motion for production be made in the course of the hearing. The Board commented that a subpoena duces tecum should relate to evidence or circumstances not apparent at the time

of the investigation. Youmans v. Lily Cups Inc. (1991), 13 C.H.R.R. D/395 (Ont. Bd. of Inq.)

18. In Gohm v. Domtar, Chairperson Pentney considered whether the scope of the Commission's power to issue a summons under the SPPA was restricted by its powers of investigation under the Code, in the context of a motion by the respondent to quash Commission summonses. The board declined to quash the summonses, stating

> ... I'm not persuaded that the existence of the powers of investigation as set out in s. 32 of the Ontario Human Rights Code, 1981, as a matter of law precludes or narrows the scope of the Commission's power to request that summonses be issued under s. 12(1). The case law does not support that proposition, particularly where such a summons is to be issued during the course of a hearing, but this power is, as I understand it, very relevant to the question of the determination ... in relation to issue number three which is whether the summons per se is invalid.

The board stated that the requests for production appeared to be in relation to matters directly relevant to the questions at issue, and were not an attempt to re-do an investigation. Gohm v. Domtar (1990), 11 C.H.R.R. D/420 (Ont. Bd. of Inq.) p. D/421.

19. The boards of inquiry in Gohm and Youmans, decided before Northwestern, suggest that the Commission's summonses may not, as a rule, include matters that should have formed part of the investigation. A human rights officer is required to gather sufficient evidence to allow the Commission to determine if the evidence warrants the appointment of a board of inquiry - the officer is not required to gather all evidence that might assist

Commission counsel in presenting the Commission's case at the hearing. A respondent is not prevented from augmenting or modifying its defence at a board of inquiry; a respondent or witness for the respondent might not make known to the officer the existence of certain documents which, at the point of the investigation in which the particular interview takes place, may not appear to be relevant. The officer cannot be expected to anticipate all issues that respondent counsel may choose later to raise, nor obtain all documents from all witnesses that respondent counsel may subsequently decide to have testify.

20. It was submitted that it is not the task of a board of inquiry to determine what the scope of the officer's investigation should have been. Rather, it is the task of the board of inquiry to determine if a violation of the Code has occurred, for which task it requires all relevant evidence. The fact that certain documents might have been obtained by an officer in the course of the investigation cannot be permitted to circumscribe the documents available to the parties at the hearing, limit the evidence before the board, and in particular, restrict a complainant's access to disclosure. Human Rights Code, 1981, s. 38.

21. It was submitted that a board of inquiry has the jurisdiction to redress the "asymmetry" in disclosure obligations by ordering Respondents' counsel to produce the documents referred to in the

Commission's letters of April 20 and 21, 1994, prior to the commencement of their respective cases.

22. A board of inquiry is charged with maintaining the fairness of the proceedings. As master of its own proceeding, and by virtue of section 23 of the SPPA, a board of inquiry can make such orders as are needed to maintain the fairness of the proceedings.

> Cedarvale Tree Services Ltd. v. L.I.U.N.A., Local 183, [1971] 3 O.R. 832, 22 D.L.R. (3d) 40, 71 C.L.L.C. 14,087 (C.A.), reversing (sub nom R. v. Ontario Labour Relations Board, Cedarvale Tree Services Ltd., Ex parte), [1971] 1 O.R. 383, 15 D.L.R. (3d) 413, 70 C.L.L.C. 14,045 (H.C.)
>
> 23(1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.
>
> Statutory Powers Procedure Act, s.23

23. It was submitted that the obligation upon the Commission to make disclosure along the lines set out in the Northwestern Board of Inquiry and Divisional Court decisions is in keeping with an increasing judicial concern with openness in civil, criminal, and administrative proceedings, and does not arise because of any similarity between criminal and human rights proceedings, nor was it said to depend upon an analogy between the role of the Crown and Commission counsel.

24. In Northwestern, Chairperson House considered whether the Crown's duty to disclose as set out in Stinchcombe ought to be applied in proceedings under the Code. He made reference to the following comments of the Supreme Court in that case:

> Production and discovery were foreign to the adversary process of adjudication in its earlier history when the element of surprise was one of the accepted weapons in the arsenal of the adversaries. This applied to both criminal and civil proceedings. Significantly, in civil proceedings this aspect of the adversary process has long since disappeared, and full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice. This change resulted from acceptance of the principle that justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met. Surprisingly, in criminal cases in which the liberty of the subject is usually at stake, this aspect of the adversary system has lingered on.
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> Christian, Dillion, Edwards et al. v. Northwestern hospital et al. Interim Decision (Disclosure) (July 27, 1993, Ont. Bd. of Inq., unreported) p. 11, 12
>
> R. v. Stinchcombe, [1991] 3 S.C.R. p.326 at p. 332

25. Chairperson House rejected the view that "protections developed in the context of criminal law may never have application to human rights proceedings." (emphasis added in the submission) He concluded that in a case such as the one before him, where the allegations were "very serious indeed, with the potential, if made out, to ruin reputations, and cas[t] a pall over the future career prospects of anyone found to have so discriminated," the Stinchcombe doctrine ought to be applied.

> Christian, Dillion, Edwards et al. v. Northwestern Hospital et al., supra, p. 9, 13.

26. The Divisional Court made reference to the above-cited passage from Stinchcombe. In commenting on the Commission's argument that

proceedings under the Code are civil rather than criminal in nature, the Court commented:

> It is in our view significant that in civil proceedings the "full discovery of documents and oral examination of parties and even witnesses are familiar features of the practice". The important principle enunciated by Mr. Justice Sopinka is that "justice was better served when the element of surprise was eliminated from the trial and the parties were prepared to address issues on the basis of complete information of the case to be met (emphasis added in the submission)." It does not take a quantum leap to come to the conclusion that in the appropriate case, justice will be better served in the proceedings under the Human Rights Code when there is complete information available to the Respondents.

The Divisional Court expressed the view that the "fruits of the investigations" were not the property of the Commission, and stated it was of the view, while not necessary to its decision, that the role of Commission counsel was analogous to that of the Crown in criminal proceedings.

> OHRC v. Jeffry House, Northwestern General Hospital et al. November 8, 1993, Div. Ct., pp. 8-9

27. It was submitted that neither the decision of the board of inquiry nor of the Divisional Court in Northwestern furnish a basis for departing from the norm in civil proceedings or for imposing a one-sided disclosure obligation.

28. First, the Divisional Court's comments about the role of Commission counsel were obiter.

29. Second, it is clear from the passage from Stinchcombe, cited by both the board and Divisional Court, that the Supreme Court was attempting to bring criminal law in line with existing practices in civil law.

30. Third, it was submitted that if there are similarities in the role of the Commission and Crown counsel, there are also significant differences in the respective proceedings that support an argument for the mutuality of disclosure obligations.

The Code establishes a process for the obtaining of compensation for discrimination which is essentially parallel to the civil process. At the adjudicative stage of the process under the Code, in contrast to criminal proceedings, the complainant has full rights as a party. The focus of the hearing is on the consequences of discriminatory conduct, and not on moral blameworthiness. A respondent cannot be punished or fined.

O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 7 C.H.R.R. D/3093

31. In Stinchcombe, the Supreme Court noted that in civil proceedings the element of surprise has long since disappeared and full discovery of documents and oral examinations of parties and even witnesses are familiar features of the practice. These changes in civil proceedings have been brought about by the development of the Rules of Civil Procedure, and are founded on the

fundamental premise that the discovery obligation is mutual. Imposing onerous disclosure obligations only on the Commission in a human rights proceeding, where the Commission is seeking a remedy for the complainant, is tantamount to imposing discovery obligations on the plaintiff but not on the defendant in the civil context.

R. v. Stinchcombe, supra, at 332

32. While Chairperson House stated that he believed that the Board of Inquiry in Hall v. A-1 Collision had exaggerated the differences between human rights and criminal proceedings in the context of a Charter challenge to the board's jurisdiction, the Manitoba Court of Appeal has since affirmed the differences in the respective proceedings in the equivalent context. The respondent in Nisbett v. the Manitoba Human Rights Commission, like the respondent in Hall, had argued that pre-hearing delay constituted a violation of his Charter rights. The Court held that s. 7 of the Charter had no application to proceedings of a non-penal nature under human rights legislation, and stated that adjudication proceedings under the Manitoba Code are "entirely civil as opposed to penal in nature". "The primary focus of human rights proceedings," the court held, "is mediative, the goal being to eradicate discrimination by emphasizing education, conciliation and persuasion."

Nisbett v. the Manitoba Human Rights Commission (1993), 18 C.H.R.R. D/504, leave to appeal to SCC denied p. 14, 15

Hall v. A-1 Collision and Auto Service and Mohammed Latif, (no. 2) (1993), 17 C.H.R.R. D/204

33. It was also submitted that Chairperson House's comments upon Professor Dawson's reasons in Hall create the misleading impression of a similarity in criminal and human rights procedures. Chairperson House states, in his reasons, that both an information may be laid and a complaint filed as of right. The Dowson case he relies upon and the sections of the Criminal Code cited, however, make clear that an individual who wishes to lay an information must have reasonable and probable grounds to believe an offence has been committed. The Justice who receives an information must hold a hearing to determine whether process should issue against the accused. That is, before the accused is notified of the accusation the Justice must have made appropriate inquiries under the Criminal Code, and decided to proceed with the charges. The issue addressed by the Supreme Court in Dowson was whether the Attorney-General could direct a stay of proceedings before the Justice had completed an inquiry to determine whether process should issue; the Court held that the Attorney-General had to wait until after process had issued.

> OHRC v. Jeffry House, Northwestern General Hospital et al. November 8, 1993, Div. Ct., p.8
>
> Dowson v. The Queen, [1983] 2 D.L.R. (4th) p. 517

34. It was said to be noteworthy that in Stinchcombe the Supreme Court stated that the question of mutuality was to be left for another day.

> The suggestion that the duty should be reciprocal may deserve consideration by the Court in the future but is not a valid reason for absolving the Crown of its duty.

35. It was submitted that if this question is left open in the criminal context, it is that much more live an issue in proceedings which have been held by the Supreme Court to provide an alternative to civil proceedings, and in which the complainant has been held to have rights that are not quite constitutional but more than ordinary.

> Board of Governors of Seneca College of Applied Arts and Technology v. Bhadauria (1981), 124 D.L.R. (3d) 193 (S.C.C.)
>
> O'Malley v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 7 C.H.R.R. D/3093

36. Reference was made to a recent case where the board of inquiry ordered each counsel to provide, one month prior to the commencement of his or her case, names of witnesses, as well as summaries of anticipated testimony, and a brief of documents.

> Jeffery v. The Board of Education et. al., Interim Decision, (July 26, 1993, Ont. Bd. of Inq., unreported)

37. It was submitted that it is the responsibility of a board of inquiry to maintain orderly proceedings and avoid unnecessary disruption and delay. Since s. 12 of the SPPA permits a board of inquiry to order a witness to produce documents, the Commission can, if unsuccessful in this motion, require the production in the course of the Respondents' case, with the attendant delay that such a procedure may entail.

38. Concern expressed by boards of inquiry over the disruption of proceedings as a result of adjournments to review documents has

been noted above. It was submitted that the interests of both efficiency and fairness to all parties would be preserved by extending to the Commission and to complainants the disclosure rights now afforded to respondents.

Submissions of YRBE

1. It was submitted that the starting point in determining whether a party to an administrative proceeding has a right to pre-hearing disclosure of documents is an examination of the procedural rules which govern the tribunal in question.

2. The procedural rules governing a board of inquiry appointed under the Code are set out in the Code and in the SPPA. In appropriate cases additional procedural rules may be imposed by the rules of natural justice.

Human Rights Code, R.S.O. 1990, c.H.19
Statutory Powers Procedure Act, R.S.O. 1990, c.S.22

3. There is no common law right of pre-hearing disclosure or discovery. In order to exist, such a right must be expressly accorded to the parties by statute or, in the administrative context, must be required by the rules of natural justice.

4. Thus, in order to find that either the Commission or the Complainant has a right to pre-hearing documentary disclosure from

YRBE in this case, this Board would have to find that the Commission and/or the Complainant has a statutory right to disclosure pursuant to the Code or the SPPA, or that the rules of natural justice dictate that disclosure be provided by the Respondents.

Disclosure Under the Code

5. The primary source of a tribunal's procedural obligations is its "home statute" - in the case of a Board of Inquiry, the Code.

6. The Code sets out a complex scheme for the processing and, ultimately, the adjudication of human rights complaints. This scheme is divided into several discrete stages, which might be referred to as Intake, Investigation, Conciliation, Appointment of a Board of Inquiry, and Litigation/Adjudication.

7. Both boards of inquiry and the courts have recognized that the stages of a human rights proceeding are discrete and successive, such that the Commission must fulfil its obligations at each stage before progressing to a subsequent stage of the process.

> Findlay and McKay v. Four Star Variety, unreported decision of an Ontario Board of Inquiry, dated October 22,1993 (Mikus, Hartman and Zemans)
>
> Dudnik v. York Condominium Corporation No. 216 (1990), 12 C.H.R.R. D/325 (Cumming), pages D/334-D/335

> Ontario Human Rights Commission v. House, unreported decision dated November 8, 1993 (Div. Ct.), leave to appeal denied by the Ontario Court of Appeal on January 31, 1994, pages 10-11

8. Once a board of inquiry has been appointed, a complaint has reached the Litigation/Adjudication stage of the human rights process. At this stage, the process is essentially an adversarial process.

9. In the Dubajic case, the present Chairman recognized that, in light of the absence of a general common law right of discovery and in light of the adversarial nature of a board of inquiry proceeding, express statutory language would be required in order to find a right to pre-hearing documentary disclosure:

> As discovery of documents is not an inherent right, it would be expected that any departure from the previous law was not intended, in the absence of more specific language....Hearings before the Board of Inquiry, under the Code, are adversarial in nature. Each party remains responsible for the preparation of its case and, as in the case of an action brought in the Supreme Court, in the absence of statutory authority, each party cannot be compelled to disclose the evidence which it may use at the hearing on the merits in support of a claim or defence. I would repeat my earlier conclusion that such a radical change in the previous law would only be effected by more specific language.
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> Dubajic v. Walbar Machine Products of Canada Limited (1980), 1 C.H.R.R. D/228 (Gorsky).

10. The Code is effectively silent on this issue of whether or not a party to a human rights proceeding is entitled to documentary disclosure prior to or during a hearing before a board of inquiry.

The only mention of documentary production appears in subsection 39(4), which confers upon a board of inquiry the power to grant an adjournment to examine documents or things produced in evidence at a hearing. It was submitted that the inclusion of subsection 39(4) in the Code indicates that the Legislature intended that there be no right of pre-hearing discovery or disclosure. The Legislature expressly contemplated that a party might be taken by surprise at a board of inquiry hearing, and provided another means of protecting against any unfairness in cases of surprise - namely, the right to an adjournment.

Human Rights Code, supra, s.39(4)

11. Section 33 of the Code (section 32 of the Code in force when the complaints were filed) provides the Commission with very wide-ranging rights to speak to any persons who may have information relevant to a complaint and to review documentation supporting both a complainant's and a respondent's case during the Investigation stage of the human rights process. Boards of inquiry have clearly held, however, that these rights exist only during the investigation stage and do not survive the appointment of a board of inquiry. This approach is consistent with the view that the stages of the human rights process are discrete and successive. YRBE submitted that the investigative powers of the Commission do not provide a basis for a request for documentary disclosure following the appointment of a Board of Inquiry.

Guru v. McMaster University (1981), 2 G.H.R.R. D/253 (Gorsky), page D/254